

No. 82-1621

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

KIMERLI JAYNE PRING, PETITIONER

v.

PENTHOUSE INTERNATIONAL, LTD, a New  
York Corporation, and PHILIP CIOFFARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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### **QUESTION PRESENTED**

Whether a \$14,000,000 judgment against a publisher and author based on the publication of a satirical work of fiction is consistent with the First Amendment, when the complaint rests solely on the claim that the satire created a false impression that the plaintiff committed certain fantastical acts, and when the satire on its face describes inherently fantastical actions by fictitious persons and there is no evidence of record that any reader believed the satire was a factual representation.

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**OPINION BELOW**

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1-12) is reported at 695 F.2d 438.

**JURISDICTION**

The judgment of the court of appeals was entered on November 5, 1982. A petition for rehearing was denied on January 12, 1983 (Pet. App. 13). The petition for a writ of certiorari was filed on April 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Kimerli Jayne Pring filed suit against respondents in the United States District Court for the District of Wyoming, alleging libel, invasion of privacy on the basis of "false light" publicity,<sup>1</sup> and "outrageous conduct." All of her claims arose from a short story entitled "Miss Wyoming Saves the World — But She Blew the Contest With Her Talent." The story was written by respondent Cioffari, a free lance writer. Cioffari sold the story to respondent Penthouse International, Ltd., and it was published in the August 1979 issue of *Penthouse* magazine. For the convenience of the Court, we have reproduced the text of the story in the appendix to this brief.

Petitioner was a performer and is now a teacher of baton twirling. She has achieved national prominence and publicity in this field (R. Vol. VIII, pp. 137-163, 181, 187, 226-231, 238-251). From June 1978 until June 1979, petitioner held the title "Miss Wyoming." In September 1978, she participated in that capacity in the Miss America Pageant. In the talent segment of the pageant, she performed a baton routine which won an honorable mention (Pet. 7).

The "Miss Wyoming" story is a fantastical work of fiction. Time and place are unspecified but the setting is a satiric version of the Miss America Pageant. The central character is a young woman named "Charlene" who, as indicated by the title

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<sup>1</sup> The original complaint asserted all four of the recognized theories of invasion of privacy. See *Restatement (Second) of Torts* §652A-652E. At the final pre-trial conference, however, petitioner limited her invasion of privacy claim to the false light theory (R. Vol. VII, pp. 48-49), the elements of which are set forth in the *Restatement*, §652E. Although the Supreme Court of Wyoming has not recognized the tort of "false light" publicity, the trial court assumed that Wyoming would follow the *Restatement*.

of the story, participated in the pageant as "Miss Wyoming."<sup>2</sup> As the story begins, Charlene is about to perform a baton twirling exercise in the talent segment of the pageant. She feels insecure and begins to think about performing her "real talent." This, her thoughts reveal, is the ability to cause those upon whom she performs fellatio to "rise off the ground" and float in the air. The story, as summarized by the court of appeals, then relates the following (Pet. App. 4):

"She thinks of Wyoming and an incident there when she was with a football player from her school. It describes an act of fellatio whereby she causes him to levitate."

The "football player" is the left end for the "Laramie Lizards," who is given the fanciful name "Monty Applewhite." There was no evidence at trial that any reader understood Monty Applewhite to be anyone but an imaginary character.

The court of appeals' description of the story continues as follows (*ibid.*):

"The story returns to the Miss America stage where she goes on to perform her talent. She there performs a fellatio-like act on her baton which stops the orchestra."

The fellatio-like act has the same fantastic effect upon the baton (Appendix, *infra*, at 7a): "It began to rise slowly. Ignoring gravity, it lifted above the astonished faces of the judges, the audience . . ."

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<sup>2</sup> When the story was published, Penthouse had no notice that the story reflected upon or created a false impression of fact about any real person (see R. Vol. X, pp. 303, 313-315, 321, 399-400; R. Vol. XI, pp. 705-706, 754, 757). Its knowledge was limited to what was apparent from the face of this fantastic work — namely, that it referred to a fictitious character called "Miss Wyoming" who was capable of performing physically impossible acts. See pages 3-4, *infra*.

The court of appeals recounted the third and final incident in the story, involving Charlene's coach "Corky Corcoran," as follows (Pet. App. 4-5):

"She is at the edge of the stage during the finals while the finalists are at center stage and the finals are under way. Charlene's thoughts are again described and these are how she would have answered the questions put to the finalists had she been one. These thoughts were that she would 'save the world' with her real talent with the 'entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro?' She would be the ambassador of love and peace. The article then describes an act of fellatio with her coach at the edge of the stage while the audience was applauding the new Miss America in center stage. This fellatio causes the levitation of her coach. It is described that the television cameras were not on the new Miss America but 'remained' on Charlene and her coach who was then rising into the air, and the story ends."

2. Petitioner filed suit on November 15, 1979, approximately four months after the publication. She claimed that the story was really about her, and that it caused her hurt feelings, weight gain, and reputational damage. Petitioner's claims were based upon similarities between herself and "Charlene," the imaginary character depicted in the story. The parallels — all of which involved matters which petitioner had placed in public view as a performer — were as follows: both were baton twirlers from Wyoming who had performed at football games, and both appeared as Miss Wyoming in the Miss America Pageant. Less significantly, Charlene at one point in the story is described as wearing a "baby blue warmup suit" and at another point as wearing "baby blue chiffon;" at the pageant, petitioner wore a baby blue and white striped warmup suit and a blue chiffon gown (which she described as baby blue at trial, but which other witnesses described as aqua) (see R. Vol. XIII, pp. 168, 173, 257; R. Vol. XIV, p. 225).



The balance of the alleged parallels between petitioner and the fictional "Charlene" are argumentative at best. For example, petitioner grew up and went to high school in Cheyenne, Wyoming, not Laramie, as did the fictional Charlene. While at the University of Wyoming in Laramie, petitioner performed at half-time for the college football team, the Wyoming Cowboys, not Charlene's clearly fictional high school team, the "Laramie Lizards." At the pageant, Charlene was accompanied only by her high school coach, "Corky" Corcoran, while petitioner, then in college, attended without a coach but with a female companion (see R. Vol. XIII, pp. 151-156, 261-262).

The dissimilarities between petitioner and "Charlene" were numerous and fundamental, as would be expected in any work of fantasy. For example, the two fictional men upon whom Charlene performed fellatio had no counterparts in petitioner's life. And most significantly, as clearly understood by all witnesses who testified (see Pet. App. 6, 8), and as would be and was clearly understood by any rational person reading the story, neither petitioner nor any other human being ever acted as did the fictional character Charlene in the only portions of the story which could be deemed defamatory.

3. In her original pleadings, petitioner alleged, as the basis for all of her claims, that the "*net effect* of the [story] was to create the impression throughout the United States and Wyoming that the plaintiff was sexually promiscuous, depraved, unchaste, . . . morally lacking, and deviant" (R. Vol. I, pp. 3, 5-6).

In connection with these allegations, and the issues of truth, credibility, and mitigation of damages, respondents sought certain discovery concerning petitioner's sexual behavior. Petitioner refused to answer any such questions. In order to avoid sanctions, her attorney drastically limited the case by

amending her pleading. Specifically, the Third Amended Complaint eliminated all references to petitioner's good character and reputation, and all allegations that the story imputed the general character defects and bad habits previously alleged. Instead of her former "net effect" allegation, petitioner pleaded that the "net effect" of the story was *to literally accuse her of engaging in the three particular acts by which the fictional character "Charlene" causes levitation*. Specifically, the Third Amended Complaint (§ 10) narrowed the claims and limited the alleged consequences of respondents' publication as follows:

"The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest."

Although the purpose of this amendment was to avoid discovery sanctions, it was neither solicited nor required by the trial judge.<sup>3</sup> For the convenience of the Court, we have reprinted petitioner's Third Amended Complaint in the Appendix to this brief.

4. At trial, there was not a scintilla of evidence in support of the allegations of the Third Amended Complaint, which limited petitioner's cause of action to the claim that the article actually created the impression that petitioner had engaged in the three specified acts of immoral behavior. To the contrary, *all* of petitioner's witnesses testified that they had *no such impression*. In the words of the court of appeals, the "witnesses

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<sup>3</sup> The trial judge ruled, on the basis of the amendments to the pleadings, that the "plaintiff is not required to answer the questions referred to" and that:

"Issues relating to the plaintiff's personal sex history prior to the publication that is the subject of this action are and should be irrelevant." R. Vol. IV, p. 1187.

from the community who appeared for the plaintiff *all* testified that the story could not possibly be about her \* \* \* (Pet. App. 6).<sup>4</sup>

During trial of the case, respondents tendered instructions which would have required the jury to find that the challenged portions of the story were reasonably understood as describing actual conduct and events involving petitioner. This was consistent with petitioner's pleadings. The verdict form tendered by respondents would have required a similar finding.

With respect to respondents' proposed jury instructions, however, petitioner's counsel repeatedly declared (contrary to petitioner's Third Amended Complaint and her petition in this Court): "everybody knows that it is fiction so that [would result in] a directed verdict." R. Vol. XV, pp. 312, 325-326, 335. The trial court accordingly rejected respondents' proposed instructions. It instructed only on the question whether petitioner could be identified as the person referred to in the story, and not on the question whether the challenged portions of the story could reasonably be understood as describing any actual con-

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<sup>4</sup> There was some evidence of joking and teasing concerning the story. But this was not shown to be a result of any factual impression reasonably conveyed by the story. Still more important, there was no evidence to distinguish between teasing which resulted from the story itself and that which occurred as a result of petitioner's filing suit shortly after the story was published (through a nationally prominent lawyer) and *publicly asserting that the story was about her*. From its inception, petitioner's lawsuit was attended by extensive publicity, in which petitioner and her attorney have been conspicuously featured. For example, petitioner posed for a cover photo for a story in the *Rocky Mountain Magazine* about a "Legendary Lawyer . . . and a Wyoming Beauty Queen . . ." who "took on 'Penthouse' for \$100,000,000." She also gave an interview which described in detail the *Penthouse* story and its purported reference to her (see R. Vol. III, p. 920).

duct or events. R. Vol. XVI, pp. 3-12. Based on these limited instructions, the jury returned a verdict in petitioner's favor.<sup>5</sup>

At the conclusion of trial, the jury awarded compensatory and punitive damages against respondents as follows:

<u>Actual Damages</u>	<u>Punitive Damages</u>
Cioffari—\$10,000	Cioffari—\$25,000
Penthouse—\$1,500,000	Penthouse—\$25,000,000

In ruling upon post-trial motions, the trial court remitted the punitive damage award against Penthouse from \$25,000,000 to \$12,500,000, but otherwise left the jury verdict intact.

The final judgment of \$14,035,000 is, by a considerable margin, the largest judgment ever upheld by a trial court in a libel case.

5. On appeal, respondents contended that the judgment should be reversed for a number of independent reasons,<sup>6</sup>

<sup>5</sup> Contrary to petitioner's assertion (Pet. 3, 16-17), the jury never was required to find that the story was "reasonably understood . . . to convey statements of fact about her." The court of appeals expressly rejected that assertion (Pet. App. 7): "The trial court submitted to the jury only the question of identity. It refused to submit the 'reasonably understood' issue although instructions were tendered." Petitioner cites certain instructions, dealing with other issues, which contain language that, at most, suggests the need for some statement of fact concerning petitioner. However, the jury never was told that it must find that the allegedly *defamatory portions* of the story depict actual conduct, or make factual assertions, about petitioner's behavior. Moreover, as discussed on pages 6-7, *supra*, there was no evidence at trial that any reader so understood the story, much less that a "reasonable" reader would do so.

<sup>6</sup> For the convenience of the Court, we have lodged ten copies of respondents' brief in the court of appeals, which fully discusses the many alternative grounds for reversing the judgment of the district court. That brief is referred to hereinafter as "C.A. Br."

including the following. First, the First Amendment precludes the imposition of liability in a case such as this based on a work of satire that could not reasonably be understood as conveying factual information about petitioner (C.A. Br. 10-27). Second, there was no proof or proper finding in this case of fault and malice, as required to sustain a verdict for actual and punitive damages in a suit based on invasion of privacy and defamation (C.A. Br. 27-45). Third, the jury's verdict was the result of passion and prejudice provoked by continuous misconduct of petitioner's counsel (C.A. Br. 45-59).<sup>7</sup>

By a divided vote, the court of appeals reversed the judgment of the trial court with directions to dismiss the complaint. The court ruled, as a matter of law, that the three passages in the story upon which petitioner relied were not actionable as pleaded because they could not reasonably be understood as describing actual facts or events involving petitioner, or actual conduct by her. Pet. App. 2, 6, 8. In so holding, the court of appeals relied upon the decisions of this Court in *Greenbelt Cooperative Publishing Ass'n, Inc. v.*

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<sup>7</sup> The \$14,000,000 judgment was procured through deliberate and calculated efforts on the part of petitioner's counsel to instill passion and prejudice by repeated appeals to regional bias and repeated emphasis upon inflammatory, irrelevant matters. See pages 45-57 and the Appendix to respondents' brief in the court of appeals. This occurred in violation of the trial court's instructions or in breach of well established rules of conduct which apply in all federal courts. During trial, the trial judge observed that petitioner's counsel repeatedly had tempted him to grant a mistrial. R. Vol., p. 193. Of particular concern in a First Amendment case such as this, counsel persistently focused upon *editorial materials* in various issues of respondent's magazine which were totally unrelated to the "Miss Wyoming" story. Those references were calculated to cast the publication as ideologically repugnant and threatening to the values of Wyoming jurors.

*Bresler*, 398 U.S. 6 (1970), and *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974), as well as the similar decision of the Massachusetts Supreme Judicial Court in *Myers v. Boston Magazine Co., Inc.*, 380 Mass. 336, 403 N.E.2d 376 (1980).<sup>8</sup>

Petitioner subsequently filed a petition for rehearing *en banc*. Five of the eight judges on regular active duty on the court voted not to rehear the case *en banc* (Pet. App. 13).

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<sup>8</sup> As noted by the dissenting member of the panel, the opinion and judgment of the court of appeals left unresolved most of the other issues raised by respondents on appeal. Pet. App. 12.

## REASONS FOR DENYING THE PETITION

1. The Miss America pageant is an annually recurring public event which commands interest and attention on a national scale. It is always one of the most extensively televised events of the year (see Appendix, *infra*, at 15a). Petitioner eagerly accepted the public attention which focused upon this event (R. Vol. XIII, pp. 247, 250-251, 272-274).

In addition to being highly visible, the pageant has provoked controversy and criticism from persons who believe that it amounts to little more than erotic puffery and trite recitations of platitudes by contestants. It has generated countless critiques and satires, some of which have been extremely caustic.<sup>9</sup>

The "Miss Wyoming" story is a work of fiction. It satirizes the Miss America pageant through grotesque irony. It applies a style of "black humor" also used by magazines such as "National Lampoon" and the television program "Saturday Night Live." Because of its inherent improbability — indeed, its physical impossibility — the narrative does not convey even the slightest impression of reality.

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<sup>9</sup> For example, ten years before the 1978 pageant, in a 1968 *Life* magazine article, correspondent Shana Alexander described the "talent" segment of the pageant — which was the focus of the crucial passages in the Miss Wyoming story — as follows:

"Talent being rarer than beauty in 18-year old girls, the talent contest places the Smile under a ghastly strain. One girl, a trampolinist, smiled madly upside down. A ballerina smiled her way through 'The Dying Swan,' somehow suggesting death in a frozen poultry locker. A third girl's talent was to synchronize bubble gum-chewing and the Charleston.

... The complication of the so-called 'talent contest' obliges (the contestants) to conspire in their own humiliation. And despite all the schmaltz and the sanitizing, there clings to the proceedings a strong taint of the auction block."

(*LIFE*, Sept. 20, 1968, p. 28).

In recognizing First Amendment protection in this context, the court of appeals has rendered a decision that is in complete harmony with past decisions of this Court and with lower courts, state and federal, which have considered the question presented. There is no authority — in federal or state court — for the proposition that a satirical work may be the basis for a multi-million dollar judgment against a publisher and author in the absence of clear evidence that the satire conveyed a false factual impression about the plaintiff. As the very cases cited by petitioner state, there can be no claim for damages unless “a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff *acting as described*.” Where, as here, “an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted \* \* \*,” a judgment for the plaintiff cannot stand. *Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 39, 92 Cal. App.3d 61, 78 (Cal. App. 1979) (emphasis supplied). This general principle has been recognized repeatedly in decisions of this Court as well. See *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 281-287 (1974); *Greenbelt Cooperative Publishing Ass’n, Inc. v. Bresler*, 398 U.S. 6, 13-14 (1970); see also *Time, Inc. v. Hill*, 385 U.S. 374, 387-389 (1967); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981).<sup>10</sup> There is no conflict in the decided cases on this point, and no reason for this Court to grant further review.

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<sup>10</sup> Similar principles have been applied consistently in the federal courts of appeals in cases involving works of fiction. See, e.g., *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2nd Cir. 1980) (The fact that similarities between the plaintiff and a character in a fictional work present an “amusing coincidence or even conscious parallelism on a superficial plane” is insufficient to establish liability); *Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141, 143 (4th Cir. 1969) (The law

(Footnote continued on next page)



2. In *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), relied on by the court of appeals here (Pet. App. 3, 5-8), the plaintiff and the city of Greenbelt, Maryland had engaged in contractual negotiations. The defendant newspaper published a charge made during a negotiating session that the plaintiff's bargaining position amounted to "blackmail," which the publisher knew was not literally true. This Court nonetheless held that, "as a matter of constitutional law, the word 'blackmail,' in these circumstances was not slander when spoken, and not libel when reported . . ." 398 U.S. at 13. Emphasizing that the subject was one of legitimate public "concern" (*ibid.*), the Court reasoned:

"It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime." 398 U.S. at 14.

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(Footnote continued from previous page)

recognizes that "obvious works of fiction are normally understood by all reasonable men as not intended to depict or refer to any actual person . . . Authors of necessity must rely on their own background and experiences in writing fiction"); *Wheeler v. Dell Publishing Co.*, 300 F.2d 372, 375-376 (7th Cir. 1962) (Holding that, even when a fictional work is overtly based upon actual events and a character is identifiable as a real person, the work nonetheless is not actionable if the manner in which the character acts is clearly fictional); accord, *Smith v. Huntington Publishing Co.*, 535 F.2d 1255 (6th Cir. 1975), *aff'g*, 410 F.Supp. 1270, 1272-1274 (S.D. Ohio 1975).

The same principle was applied in *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974). In that case, a union published in its monthly newsletter, under the heading "List of Scabs," the names of workers who had not joined the union. It thereafter defined a "Scab" as a:

"two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles . . . The Scab sells his birthright, country, his wife, his children and his fellow men for an unfulfilled promise from his employer . . . [A] SCAB is a traitor to his God, his country, his family and his class." 418 U.S. at 268.

This Court noted that such comments, while extremely offensive, could not reasonably be understood literally or as factual representations:

"Such words were obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who opposed unionization." 418 U.S. at 284.

Relying on its earlier decision in *Greenbelt*, this Court held that such a statement — which it was "impossible to believe that any reader" understood literally — was not actionable in the context of a labor dispute. 418 U.S. at 285-286.

The foregoing principles were applied to a satirical writing in *Myers v. Boston Magazine Co., Inc.*, 403 N.E.2d 376 (Mass. 1980), also relied on by the court of appeals here. That case involved a magazine article entitled "Best and Worst: Sports." Under the heading "Sports Announcer," the article stated the following concerning the plaintiff:

"Worst: Jimmy Myers, Channel 4. The only newscaster in town who is enrolled in a course for remedial speaking." 403 N.E.2d at 377.

Relying on *Greenbelt* and *Letter Carriers*, the court held that such statements could not be understood literally, but at most suggested the opinion that the plaintiff "should" have been

enrolled in a remedial speaking course. As in *Greenbelt* and *Letter Carriers*, the court emphasized the *context* of the statements, in which "rough humor" and propositions which "are generally preposterous" were pervasive features. 403 N.E.2d at 377, 379-381. The plaintiff argued, as petitioner argues here, that unlike the cliches and figurative speech at issue in *Greenbelt* and *Letter Carriers*, the magazine article asserted factual propositions in declarative form. But the *Myers* court, like the court of appeals in this case, correctly applied the pragmatic approach mandated by *Greenbelt* and *Letter Carriers*:

"Removed from context, the statement passes for a factual proposition whose sense is clear. Only in context does it assume ironic proportion, with an 'is' substituted for an 'ought.' But the mere presence of a different kind of figurative language from that found in other cases does not free this case from the claims of the distinction between fact and opinion. If the device here is lacking in art, it is no less figurative than a vague epithet or a soaring metaphor. And it deserves the same protection under the First Amendment.

The magazine's statement does not arise from 'conventional give-and-take in our economic and political controversies,' but it does partake of an ancient, lively tradition of criticizing, even lampooning, performers. To sharpen the bite of his rapier, a critic may resort to caricature or rhetorical license. So long as he excludes false statements of fact from his arsenal, the Constitution will shield him." 403 N.E.2d at 380-381.

The court of appeals in this case simply applied these sound and well established principles to the limited factual issue before it. Using the analysis of *Greenbelt*, *Letter Carriers* and *Myers*, the court of appeals examined the context of the portions of the story at issue here and found that "[i]t is simply impossible to believe that a reader . . . would not have understood that the charged portions were pure fantasy and nothing else" (Pet. App. 8). That careful scrutiny is essential in

free press cases, in which this Court has required an independent examination of "the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964). It also is consistent with the traditional function of a reviewing court in libel cases under the common law. *Restatement (Second) of Torts* §566, comment c at p. 173; *id.* at §614; *Myers v. Boston Magazine Co., Inc.*, 403 N.E.2d at 378-379.

3. Petitioner nonetheless contends (Pet. 3-4, 11-12, 19, 21) that the opinion below creates immunity for such works whenever an author injects any element of fantasy. To the contrary, the conclusion of the court of appeals did not turn upon the author's injection of a single element of fantasy. Rather, it was based upon the contextual approach approved by this Court and universally employed by other courts. *In context*, the element of levitation is just one element, among many others, which unequivocally tells the reader that all of the depictions in this story are pure fantasy.<sup>11</sup> The court of appeals left no doubt that its decision was based upon the entire context of the story in question, and not just the presence of a single element of fantasy (Pet. App. 5-6):

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<sup>11</sup> Other factors include: The story's fantastic title ("Miss Wyoming Saves the World . . ."); the description of the story as "humor" and the general disclaimer of any relation of characters in the story to real persons ("Any similarity between persons or places mentioned in the fiction or semifiction and real places or persons living or dead is coincidental" R. Vol. XXX. Ex. 351); the surrealistic character of accompanying artwork; the stream of consciousness narrative; the lack of even a minimal identification of the central character, Charlene, through use of any surname, photograph, drawing, or the like; the literary style and use of fanciful and alliterative names, e.g., "Monty Applewhite," "Corky Corcoran," "Laramie Lizards;" the use of stereotypes and the lack of concrete detail in the descriptions of places, characters, and the interactions among them; the lack of any mention of date or time; and the absurdity of the plot as a whole and the details depicted.

"Here, the underlying event described was the Miss America Pageant, but it was readily apparent, with the extended description of thoughts of Charlene and other indications, that it was all fanciful and did not purport to be a factual account. In this context there are the particular three incidents which are in themselves fantasy and present levitation as the central theme and as a device to 'save the world.' We have impossibility and fantasy within a fanciful story. Also of significance is the fact that some of the incidents were described as being on national television and apparently before the audience at the pageant or part of the audience. This in itself would seem to provide a sufficient signal that the story could not be taken literally, and the portions charged as defamatory could not reasonably be understood as a statement of fact. Again, as the Court said in *Greenbelt*: 'It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant.'"

In fact, it is petitioner who would have this Court segment isolated statements in the story, wrench them from the context of the story as a whole, and find them actionable because, taken out of context, they are not inherently fantastical.<sup>12</sup> The law of libel always has required that an alleged defamatory statement be examined in the context of the publication as a whole. *Restatement (Second) of Torts* §563, comments d and e. And the need to examine statements in context was given constitutional status by this Court in *Greenbelt*.

Petitioner's effort to argue that her privacy was invaded as a result of being portrayed in a "false light" must fail for the same reasons. The "false light" claim, just like the libel claim, was predicated upon the Third Amended Complaint, which limited all claims to false literal meaning stemming from three specific incidents — each of which involved levitation through

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<sup>12</sup> Petitioner has not even furnished the Court with a copy of the satire at issue in this case. She prefers to quote from it selectively and out of context.

fellatio. Those fantastic events conveyed no literal meaning at all. Moreover, the gist of a false light privacy claim is a publication which contains a false factual representation, by which the plaintiff is "made to appear . . . otherwise than as he is." *Restatement (Second) of Torts* §652E, comment b. This Court has noted the similarity between "false light" and libel cases, in that both involve "public exposure by false matter . . ." *Time, Inc. v. Hill*, 385 U.S. 374, 384-385 n. 9 (1967). In *Hill*, the Court recognized the actionability of a "fictionalized" account, but only in "what purported to be a biography" — *i.e.*, fiction masquerading as the truth. *Id.* at 377-378, 393-396. Thus, the "false light" branch of the law of privacy also recognizes the distinction between works which present false statements about a real person as the truth — "falsifications which the reader might accept as true" and therefore "capable of presenting plaintiff in a false light" — and works which contain imagined events about a real person that the defendant has not "represented . . . to be true" and which make it "evident to the public that the events so depicted are fictitious." *Hicks v. Casablanca Records*, 464 F. Supp. 426, 432-433 (S.D.N.Y. 1978).

4. The unusual procedural posture of this case makes it an especially inappropriate vehicle for review of the broad constitutional issues that petitioner asks this Court to adjudicate. For tactical reasons, petitioner limited her complaint at trial to the sole claim that the article created a false impression that she committed three specific acts. At trial, this claim proved to be (and was conceded to be) unsupportable. See page 7, *supra*. Thus, at issue here is a narrow question of failure of proof, which turns upon the facts of record of this particular case.

The *Letter Carriers*, *Greenbelt* and *Myers* decisions prescribe a three-step inquiry. First, is the publication reasonably understood as intended to convey literal or factual information? Second, would a reasonable reader understand the author to be implying something on a nonliteral or figurative level? Third, is

the proposition which could be found to have been expressed or implied by the author actionable?

Because petitioner's pleadings drastically limited the scope of her case, the court of appeals did not need to go beyond the first step of the analysis. The opinion of the court of appeals correctly described the narrow scope of the issue before it as follows (Pet. App. 5):

"The complaint, as amended, refers to these incidents and limits the consequences to:

'The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest.'

Plaintiff by her amendment of her complaint to avoid answering interrogatories, as mentioned above, *narrowed her cause to the three incidents and limited them to the descriptions with no general implications*. This had three consequences: the trial court limited defendants as to what they could question plaintiff about — no sex history; *prevented plaintiff from any use of general imputations of immorality; and caused a reliance on the particular descriptions*" (emphasis supplied).

At trial, no witness testified that he or she received any impression of fact from reading the story here at issue — or, in particular, that petitioner ever engaged in "fellatio" as described in the Third Amended Complaint. To the contrary, all witnesses testified that they understood that the story was a fantasy, and did not purport to relate any actual events. R. Vol. IX, pp. 208, 239, 251; R. Vol XI, p. 796; R. Vol. XIII, pp. 84, 265-266; R. Vol XIV., pp. 33, 35, 76. As the court of appeals explained, there was simply no evidence that would support a judgment on petitioner's theory of the case. "The witnesses from the community who appeared for the plaintiff *all* testified



that the story could not possibly be about her" (Pet. App. 6). "All the testimony from plaintiff's lay witnesses was that it could not be about the plaintiff" (*id.* at 8). The same factor was emphasized in *Greenbelt*, 398 U.S. at 14:

"Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime."

Thus, because of the highly limited issue before it, the court of appeals' opinion has no bearing upon cases in which it may be claimed that plainly fantastic depictions have a figurative or allegorical meaning that expresses or implies facts about an individual. Nor does it immunize writings as to which reasonable persons could conclude that an author, even though writing a work of fiction, has made factual assertions about the persons who were models for the work.<sup>13</sup>

The narrow issue decided by the court of appeals is whether the record supported the only substantive allegation

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<sup>13</sup> This is what was alleged in *Bindrim v. Mitchell*, 92 Cal. App.3d 61, 78, 155 Cal. Rptr. 29, 39 (Cal. App. 1979), *cert. denied*, 444 U.S. 984, *reh. denied*, 444 U.S. 1040, the case principally relied upon by petitioner here and in the courts below. However, even the *Bindrim* court recognized the principle which governs this case:

"The test is whether a reasonable person, reading the book, would understand that the fictional character therein pictured was, in actual fact, the plaintiff acting as described . . . In some cases, such as *Greenbelt Pub. Ass'n v. Bresler*, *supra*, 398 U.S. 6, 90 S. Ct. 1537, 26 L.Ed.2d 6, an appellate court can, on examination of the entire work, find that no reasonable person would have regarded the episodes in the book as being other than the fictional imaginings of the author about how the character he had created would have acted. Similarly, in *Hicks v. Casablanca Records*, (D.C.S.D.N.Y. 1978) 464 F. Supp. 426, a trier of fact was able to find that, considering the work as a whole, no reasonable reader would regard an episode, in a book purporting to be a biography of an actual person, to have been anything more than the author's imaginative explanation of an episode in that person's life about which no actual facts were known."



presented by petitioner's complaint. The court of appeals correctly concluded that the record is devoid of any such evidence and that petitioner's allegations concerning the meaning of the story were unsupported as a matter of law. Accordingly, petitioner's allegations did not warrant submission to the jury in the first place, even if the jury had been properly instructed.

Thus, even if this Court were disposed to fashion broad new rules of liability that would expose authors and publishers to multi-million dollar judgments for disseminating satirical works on subjects of general public interest, it should not attempt to do so on the record presented by this case.

5. Petitioner nonetheless argues (Pet. 14) that *Greenbelt* and *Letter Carriers* are inapplicable here because they involve publications affected with a "public interest," which purportedly is not present in the case of a "false and defamatory article about a private person in a 'girlie magazine.'"<sup>14</sup> If such an assertion is relevant at all, it ignores the larger significance of the "Miss Wyoming" story as a satire of the Miss America Pageant, which commands significant public attention throughout the nation. Any purported similarities between petitioner and the "Charlene" in the story which form the basis for

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<sup>14</sup> The petition also suggests (Pet. 22-23) that the purported adverse effect of the story was enhanced because it was interspersed with other material in the magazine. This suggestion is without merit. The story in question was printed separately from and uninterrupted by other materials in the magazine. (For the convenience of the Court, we have lodged copies of the story as originally printed).

The petition also attempts to create the impression (Pet. 10, 13, 22-23) that *Penthouse* magazine is an obscene publication. This also is a false imputation. The very publication in question contained political discussion, articles about consumer products, and travel information, in addition to adult entertainment. The magazine is a lawful publication circulated in all 50 states, and the trial court specifically prohibited (in an order which was repeatedly violated by petitioner's counsel) any reference to the subject of "obscenity" (R. Vol. IV, p. 1390).

petitioner's claims all relate to matters which petitioner placed in public view as a public performer.

In a decision announced earlier this Term, this Court unanimously reaffirmed that public interest in a subject immunizes publicity which does not convey a false factual impression. *Connick v. Myers*, \_\_\_\_ U.S. \_\_\_\_, 51 U.S.L.W. 4436 (1983). All members of the Court concurred in the following point stated in the majority opinion:

"The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. See *Restatement (Second) of Torts*, §652D. See also *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) (action for invasion of privacy cannot be maintained when the subject-matter of the publicity is matter of public record); *Time v. Hill*, 385 U.S. 374, 387-388 (1967)."

51 U.S.L.W. at 4437 n. 5. This is a question of law for the Court to resolve (*id.* at 4439 n. 10), based upon the "content, form and context of a given statement . . ." *Id.* at 4438.

The dissenting opinion in *Connick*, although disagreeing with the majority's application of this concept, adhered to the same view of the legal standard. The dissenting Justices emphasized that "the broad conception of 'matters of public interest' . . . defines the scope of constitutional privilege in invasion of privacy cases." And they quoted with approval the *Restatement (Second) of Torts* §652D, comment j (1977):

"The scope of a matter of legitimate concern to the public is not limited to 'news' . . . It extends also to the use of names, likenesses or facts in giving information to the public for purposes of . . . amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."

51 U.S.L.W. 4443 n. 5. The same principle is used to define the scope of the common law fair comment privilege. See R. Sack,

*Libel, Slander and Related Problems*, Sec. IV.3.4, at pp. 169-172 (PLI 1980) (collecting cases).

The inquiry which is constitutionally permissible in evaluating a complaint against a work of fiction or humor is not whether the general reader would appreciate its purpose or message, but whether any reasonable reader would be left with the impression that the author is asserting false facts about the plaintiff. Whether a reader might or might not find the author's attempt at satirical commentary to be "funny," "tasteless" or "repugnant" depends upon his or her own sensibilities and is irrelevant to the constitutional inquiry. See Pet. App. 9; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("The line between . . . informing and . . . entertaining is too elusive for the protection of that basic right [of free speech] . . . Though we can see nothing of value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature").<sup>15</sup>

Petitioner nonetheless urges review (Pet. 23) because "[i]t is time for common sense to prevail." We also think it is time for common sense to prevail. If petitioner's unprecedented theory of liability were sustained in the present case, it would bring to a virtual halt the publication of satirical writing that is inspired even indirectly by real events and real people participating therein. If it were possible to sustain a multi-

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<sup>15</sup> See also *N.A.A.C.P. v. Button*, 371 U.S. 415, 444-445 (1963) (expression is protected regardless of "the truth, popularity, or social utility of the ideas and beliefs which are offered"); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157-158 (1946) ("Under our system of government there is an accommodation for the widest variety of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values").

million dollar judgment without proof that a satire conveyed false factual information — that is, if such a judgment could rest on the mere allegation that the satire contains “outrageous ridicule” or “clearly demeaning fantasy” (Pet. 21) — no publisher would dare to publish the kind of satirical commentary on social events that from time immemorial has been a central component of free expression.

One striking measure of the fundamental error in the argument advanced by petitioner is its applicability to classical satires which could not seriously be considered to be unprotected by the First Amendment if published today. If the First Amendment permitted damage awards to be rendered against “clearly demeaning fantasy” or “outrageous ridicule” (Pet. 21) — even though no reader understood the satire to be a representation of fact — then the most famous satires in Western literature would be subject to condemnation. There would be no principled basis for punishing the publication here in question, while sheltering those writings.<sup>16</sup>

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<sup>16</sup> The heroine in the *Penthouse* satire is not the first character in a lampoon to “levitate” above the masses. In Aristophanes’ comedy *The Clouds*, the philosopher Socrates is made to soar above the earth while engaged in ridiculous speculations. No one could conceive this to be a representation of fact; nonetheless, it exposed Socrates to ridicule. Dante went further than Aristophanes, placing Boniface in the *Inferno* many years before his death and exposing him to imaginary torments. This was an outrageous form of ridicule, but no reader failed to comprehend that it was wholly fictitious. In more recent times, Alexander Pope satirized Colley Cibber in the *Dunciad* and exposed him to rude and scatological abuse. Yet no reader conceived that those descriptions were other than sheer fantasy. Charles Dickens, in *Hard Times*, painted a portrait of professor Gradgrind that was modeled on Thomas Mill and his famous son, John Stuart Mill. The barbs were embarrassing, but the story was wholly fictive. Marcel Proust, in *Remembrance of Things Past*, based his degenerate nobleman, Charlus, on Montesquieu. Although Proust’s character derived from real life, the preposterous events in the story were obviously works of imagination. Still more recently, the cartoonist Gary Trudeau has created characters in comic strips

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based on real life persons. For example, Professor Green, an absent-minded "flower child" of the 1960s, is inspired by Professor Charles Reich (the author of *The Greening of America*). The source of the joke is well known, but it is patently obvious that the cartoonist intended a comic lampoon and not a representation of fact. These examples could be multiplied endlessly. At the time these works were written, none of the subjects of the satires were political figures. As inspiraton for satire, their activities were comparable in all respects to those of persons participating in an event of general public interest such as the Miss America Pageant.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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MAY 1983

## APPENDIX

MISS WYOMING SAVES THE WORLD  
... BUT SHE BLEW THE  
CONTEST WITH HER TALENT.\*

[Illustration omitted]

Fuming inside her baby-blue warm-up suit, Miss Wyoming rushed into the cocktail lounge of the Beach Queen Motel, holding her baton at port arms. She saw in a flash that Corky wasn't there, and she stopped short midway between the lounge and the bar in order to catch her breath. Laughter drifted her way from the corner where Miss Alaska sat, at the head of the banquet table, sipping a frozen daiquiri. All of the women at the table wore evening gowns, and they were smiling at Miss Wyoming's warm-up suit in a way that made her fling her head back and move toward the bar at a pace somewhere between a strut and a sling, dangling the baton at her side like a parasol.

"What'll it be, Miss Wy?"

"Have you seen Cork---?" She caught herself and started over, slower this time, almost in a drawl. "Have you seen Mr. Corcoran, a member of my party?" Actually, there was no party, just Corky and she, which was only one of the things that made her feel so deprived. It was bad enough that they had to stay at a second-rate motel like the Beach Queen while the other girls, except for Miss Alaska, were all in penthouse suites in the posh hotels on the boardwalk; bad enough that all the others, *even* Miss Alaska, had come with large groups — men who looked like senators, women who belonged in mansions. But on top of that Corky had gone off two hours ago without telling her where to, and she had gotten so upset that she couldn't do even the simplest routines with the baton. Now, less than forty-five minutes before the preliminary talent contest, he still wasn't here, and she wanted to cry.

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\* [Photocopies of this story, as originally printed in *Penthouse* magazine, have been lodged with the Court.]

"Haven't seen him all day," the bar man said, wiping a space on the bar in front of her.

She lay her baton flat where he had wiped and slumped onto a bar stool, leaning forward with her face propped on her hands. For a moment she longed for the musty security of the Laramie High School gym, where she had trained all summer under Corky's protective eyes. Thinking of those long, hot afternoons made her nostalgic, even though most of the time she had been exasperated with him, balking at the rigors he put her through, complaining that he never left her alone.

Just then she saw him poke his head inside the door of the lounge, and she felt a moment's rush of joy and relief before she reminded herself how upset she'd been. She pretended not to see him.

"How's my winner?" He called out in a voice geared to project across a gym, and then his fleshy hand was patting her back. She stiffened against it.

"A lot *you* care. I couldn't even practice."

"Aw, baby, I'm real sorry. I got tied up. Takin' care of politics, you know. Got to charm them on all fronts."

She knew that he wanted the title as much as she did, and she even felt a little silly now for not realizing that wherever he'd gone it was for her own good. But she said, "I need a drink," because she knew that would infuriate him. To the barman, she said: "Bourbon and ginger."

"Just make that a ginger ale," Corky cut in, barking it over the bar in his training voice. "*Diet* ginger."

Backstage she burped and tasted the sour residue of soda as she listened to Miss Wisconsin's piano rendition of "Moonlight Sonata." She was up next, and she felt as jumpy as a grasshopper and as small, imagining how she was going to look out on the runway with just her baton. She had no voice or musical talent to fill the dark acres of space in the audito-



rium, no dance routine with movements large and elaborate enough to create the illusion of stature, of dimensions beyond the actuality of her physical self. Just a stick of polished chrome to flip and curl about her fingers, some simple legwork executed with a high-stepping prance that had made her a halftime attraction at all the Laramie Lizards' home games.

As she slipped out of her warm-up jacket and pants, she had to think about her secret talent, her *real* talent, to make herself stop trembling. She recalled that Friday afternoon in late summer when she first discovered it, the events of that day unfolding like a stairway to a dream she still could hardly believe was true: unexpectedly running into Monty Applewhite, the Lizards' left end, in the gym; literally running into him, *colliding* with him as she pushed through the double doors to get a drink at the precise moment he came jogging up from the locker room; realizing in that moment when pressed against him not only how horny she was, sex playing no part in Corky's training strategy, but also how depressed, too, over her three hours' workout with the baton.

Then driving with him to Colter's Bay, signing in at one of the log cabins on the lake, hitting the bed as soon as they got inside the door, Monty lifting her first and then carrying her to the mattress like a deep pass he'd snagged, bringing her downfield, his body running hard with her, driving straight on, the end zone so close that they crossed into it too soon to enjoy the touchdown; and the disappointment afterward, the letdown, feeling herself rolling end over end back into her own isolation, Monty, too, quiet and joyless beside her in the moody silence of the cabin.

She was still brooding over it later, at dusk, as they walked along the shore of the lake, wondering how she even could have entertained the hope of becoming Miss America.

They had reached a deserted section of the shore, and Monty stripped off his clothes to go swimming. Feeling gloomier than she had all summer, she stared off across the lake to the blue gray rock of the Tetons that rose in sharp, chiseled ridges directly out of the water. The mountains were so magnificent, towering as they did so far above earth, so full of grandeur and majesty, that she began to weep.

At that moment Monty came dripping up out of the lake. He stood in profile on the shore, framed by the mountains. The twilight shaded the entire landscape blue: mountains and clouds, mist seeping like night's breath across the center of the lake, the air itself, soft and depthless as the space between stars. Monty's body, too, had been tinted, so that as he stood in silhouette, posed, he appeared more like a work of art than a Lizard, his private part extended without being rigid and arched in a downward curve like a spigot. She felt herself being drawn to it, and she did something she had never done to anyone.

She drew his flesh into her, not with her mouth alone but with her entire body, the deepest, most remote parts of her uniting in common effort, calling to him, worshipping side by side with her lips and tongue and the warm tube of her throat, all of her, body and soul, crying in harmony for nourishment. Beyond the borders of his hips, her glazed eyes scaled the Tetons, pleading with the snow-tipped summit of the highest peak for she knew not what — strength, endurance, love? — that she might lift his soul (and her own) from despair. He began to pour into her, and she thought she could feel his soul rising within him, his fountain rising at the same time so that she had to strain up on her knees to keep it in place. When she opened her eyes, she saw that it was not only his soul that had risen but his body, too. A good inch or inch and a half off the ground, he hung suspended from her mouth. In the blue light his face was transfigured by a rapture unparalleled by anything

else she had ever seen, his body floating as light and free as the lake mist, and she knew then that she would never have to feel worthless again.

If only, she thought while listening to the final falling notes of the Sonata, if only she could make them see her real talent, if only she could force them to look beyond the baton.

Baton in hand, she stood in the wings while Emory Dukes, the pageant emcee, introduced her.

"Now!" the stage manager said, shoving her forward.

She gripped the baton and strutted out onto the stage. When the spotlight struck her, she felt herself shrivel inside. *They'll laugh, she told herself. They're gonna laugh at this stupid baton.* But in her mind she saw Monty floating upward from her mouth, and she began to smile. She was the sister of the Grand Tetons, which meant *big tits* in French, and she shoved hers forward into the spotlight and highstepped her way to center stage, stopping at the tip of the runway long enough to make sure that the judges had their eyes on her. She flashed them a *watch-me* smile at the same time she spotted Corky at the edge of the runway, his face filled with longing and appreciation. With her head tossed back, she took a prancing step forward onto the runway, flashing her thighs, and swung her baton high in the air.

Closer than ever to his dream, Corky watched the baton flicker through the long, high beam of the spotlight and glitter as bright as a mirror held to the sun. The dream had first made itself known to him the year he turned forty while he was watching the pageant, drunker than usual and lonelier, in the same Laramie barroom where he had watched it for years. As each of the fifty contestants passed across the television screen, he realized with the sharpness of a pain even his night's drinking couldn't dull that this was as close to real beauty as he would ever get, that without his having noticed, his life had

crept up behind him and slipped a noose around his neck. As each of the contestants smiled and turned away, lost to him forever, he saw that his life was no more than a circle, that the lives of all men could be charted by one of two circles: an ordinary circle, which went round and round in the same orbit forever, or an extraordinary one, which was larger and touched the edges of many other circles, allowing a man to move from one extraordinary circle to another without limitation. He had been kicking around long enough to know that his future promised nothing more extraordinary than an undefeated season for the Lizards. Unless, he mused, watching that year's Miss Wyoming curtsy on the screen as he took a long draft of his beer, unless he picked himself one, got her into shape, turned her into a winner. Why not? he asked himself. Who knows more about building bodies than I do?

And that Monday he began his search, looking with new eyes at each of the Laramie High coeds that passed through his gym classes, until Charlene appeared in her orange jersey and black shorts one September morning, standing with her hands on her hips at the end of a lineup of freshman coeds, and he knew right away that he had all the raw material he needed.

Under the basketball hoop, he said: "I'm keeping my eye on you!"

"What for?"

"Miss America."

Charlene's eyes widened; she swallowed hard. "Me?"

They sure had come through a lot together, he was thinking, as Charlene turned at the tip of the runway and moved from drill step to strut, knees kicking and her head high as she approached the judges once again; and they would go through a lot more together, he hoped, tomorrow night when the pageant was over. When she reached the judges' booth, she

turned, marking time, so that they would have a full view of her — smile, bust, delicious thighs, all that raw flesh that he had shaped, larger than life on the runway above them.

"It'll be like the grand finale at the end of a fireworks display," he had advised her when they were plotting strategy. "The icing on the cake. Show 'em everything you've got." Everything being her face, bod, and a reprise of all her baton tricks. But what she was doing now was not part of the repertoire they had rehearsed.

She had gone from the two-hand twirl to a movement he didn't recognize. She held the baton out in front of her, one end inches from her smiling mouth, the other aimed directly down at the upturned heads of the judges. For a moment it looked as if she were playing a trumpet, but he saw that the gesture was more suggestive than that. While her right hand held the baton up to her mouth, her left stroked outward along the polished chrome in the direction of the judges. She had abandoned all semblance of a marching step. Instead her body swayed in a kind of interpretive dance, her shoulders rolling forward and back, her hips swiveling with slow determination as she continued the stroking motion.

*What the hell?* Corky fumed. *What in hell is she doing?*

She moistened the rubber tip with her tongue, trying at the same time to keep her mouth wide in a smile so that the effect was to give her lips a crazed, hideous imbalance. "Jesus Christ!" he mumbled out loud in spite of himself as she drew the tip inside her mouth. With her head and shoulders back, she inhaled deeply. She let her hands — first one, then the other — drop away from the baton. For a moment it hung limp, downcast. Then it began to rise slowly. Ignoring gravity, it lifted above the astonished faces of the judges, the audience, pointing in its arc higher than the upper tiers of the balcony, until it came to rest, its silver skin glistening, focused on the deep shadows of the ceiling.

The Miss America Orchestra quit midbeat, the musicians stalled in tableau, their instruments poised, mute. In the dark sky of the auditorium a silence, thick and sinister as a storm cloud, had settled. The crowd seemed not to be breathing, life manifest only in the eyes that, gaping awestruck, had witnessed the incomprehensible — miracle or obscene hoax? — and had been devastatingly humbled by it. Then the cloud broke. A low hiss of applause began in the recesses of the balcony, gusted up out of the lower tiers, came teeming down across the wide, flat spaces of the orchestra until at least half the audience was on its feet and the band jumped into something loud and brassy.

Corky glanced anxiously at the judges. They were fluttering in the booth like startled birds. Three of them looked downright horrified. One was writing furiously on his clipboard. Another swayed back against the rear wall, hand roofed above his eyes to ward off the dazzling shimmer of the baton, and one, at the far end of the booth, turning with a bewildered look from Miss Wyoming to the crowd behind him, put his hands together hesitantly and began to clap.

"What kind of crazy stunt was that?" Corky demanded the first minute he got her alone that night. They were heading back to the Beach Queen on a dark, windy street that led away from the boardwalk.

"You said to show them *everything*."

"It looked like you were giving the damn thing a blowjob."

"That's just . . ." But she stopped. He wouldn't understand. Only Monty understood.

"If I told you once, I told you a hundred times. You've got to keep the sex subtle. Like a candy bar," he explained. "You've got to put on a bright, clean wrapper. Keep the dark, chewy, good stuff inside."

"That's bullshit."

"That's America," he said. "They don't even call it a beauty contest anymore. It's a scholarship pageant now you know that."

"But didn't you like it *at all*?" she purred in her cutest kitteny voice.

Corky wasn't listening. "Maybe they didn't see it like that. Maybe it just looked like a fancy circus trick. Maybe," he pondered aloud, his voice barely concealing a whimper of sadness, "I've just got blowjobs on the brain . . ."

In baby-blue chiffon, Miss Wyoming waited onstage with the forty-nine other state representatives for Emory Dukes to read the names of the ten finalists. She trembled as the television cameras were being rolled down the runway because she was sure that, of all of them, it was her face that was now growing larger on 60 million television sets from coast to coast, as if the cameramen had already divined her destiny and were giving the viewers at home a peek at things to come.

"Miss Virginia," Emory Dukes called out. "Miss Montana, Miss Iowa, Miss Wisconsin, Miss Arkansas, Miss New Hampshire, Miss Oklahoma, Miss Alaska . . ."

Miss Wyoming was still waiting for her name to be called when the curtain began to close. In the dressing room she sat on a bench, numbed, ignoring the other girls while out on the stage the finalists displayed their talents. She closed her ears against each high-pitched burst of song that drifted back, each fragment of vibrato, each note of piano and violin. Right before they were all to assemble on stage for the grand finale, Miss Alaska swept past her bench, her head and shoulders tossed back. "Tough luck, sweetie," she said.

It was one injustice too many, and Miss Wyoming's foot shot out. "You're not even from a real state," she said, toppling Miss Alaska. "You're not even from a real goddamn state."

"I am so!" Miss Alaska protested on the way down. Her hands clawed wildly for support, found the hem of Miss Montana's gown and tore it loose from the bodice.

"Bitch!" Miss Montana shrieked, yanking her gown free and stepping back, in the process knocking against Miss Idaho, who was at the next table and was spraying her hair with an aerosol can. Miss Idaho turned the can around and sprayed directly into Miss Montana's face. Miss Montana choked; her eyes teared. She reached for a tube of lipstick and streaked down the middle of Miss Idaho's gown. Miss New Jersey punched Miss Montana. Miss New York threw a powder puff at Miss New Jersey. Miss Florida shoved Miss New York, who shoved Miss Tennessee. Miss Tennessee spit at Miss Florida.

Miss Alaska was still shouting, "I am *so* from a real state; I am *so*!" when the stage manager rushed in. "Girls! Girls!" he pleaded to the mass of tangled bodies in the middle of the room. "What is the meaning of this?"

Five minutes later, when he was marching them out single file and still bitching, he noticed Miss Wyoming on the bench. "And what do you think *you're* doing?"

"Nothing," Miss Wyoming said, leaning back against the wall with her arms folded. "I'm not doing *anything*."

"You'll regret this. Mark my words!" And then he whirled around and trailed after the ragged line.

A moment later Corky popped his head inside the door. "What's the matter, darlin'?" he slurred, the anticipation of the big night having driven him to drink beyond his capacity. He wavered into the room, looking sheepish, his arms extended.

Miss Wyoming thought that she was going to cry. She leaned all the way forward and pressed her face into her hands.

"Try not to take it so hard, darlin'."



"Why the hell not?" She was pissed that he could adjust so quickly, that his getting ripped had dulled his disappointment. But when she lowered her hands and looked at him there in front of her, weaving in place, his eyes lovesick and weary, she couldn't be angry with him.

Corky hiccuped and sat down on the bench, as he did so pulling his pants up at the knees. He leaned over and put his hand on her knee. She might have been a Lizard he was consoling for having fumbled at a critical moment. And then she did cry. In loud, breathless sobs, leaning against him.

Holding her tight, he closed his eyes and patted her. All summer he had dreamed of holding her, but his gesture now was without lust. In some way he felt responsible for her tears, for having brought her this far, to this disappointment, and he wanted only to comfort her as best he could. His head was spinning wildly, and he had to open his eyes. "I think it was the talent business . . ."

"I have talent," she sobbed. "I have *real* talent."

"I know, darlin'," thinking she meant the baton, "but . . ." He knew he had no power to change what had happened, but he wanted, at least, to try to explain it for her. "I think what it was, honey, is that you're just too damn sexy. I mean, you don't even have to *do* anything; it just oozes out of you as natural as . . ." One hand clamping her shoulder, the other waving helplessly in the air, he floundered for a comparison. "As natural as . . . sweat." It was not the word he wanted — he had wanted something else, something prettier — but his head was fuzzy, and the thought he was trying to shape was growing, moment by moment, dimmer. He hurried to finish before it went dark altogether. "And anything too real scares the shit out of people, I guess."

It was the most profound insight he'd ever had, and he felt pleased with himself. Miss Wyoming was pleased, too, overjoyed, in fact, and she stopped crying immediately because now

she understood why she had not made the finals. She was so happy that she leaned up and kissed him warmly on the neck. "Thanks," she said. "For that. For everything."

And then she was on her feet, wiping the tears from her face. "Help me, Corky. Help me show them."

*Show who?* he wondered, upset by her sudden movement, the walls spinning one way, Charlene the other.

She hurried him down the corridor toward the stage. For a moment she fumbled with the curtain and then found the opening and pulled him out onto the stage.

"What are you *doing?*" he wanted to know, feeling the stage careening around him and trying to regain his balance.

"Shhhh!" She knelt down and unzipped his fly. She wanted to show them that her talent was nothing to be feared, not dangerous, but beautiful and necessary.

"Not here," he pleaded, dreaming of a long night's privacy at the Beach Queen as she dipped inside his pants with one hand and steadied him with the other.

"Trust me," she whispered, and she slipped him into her mouth just as Emory Dukes announces the fourth runner-up.

They were shielded from the audience by a wall of evening gowns and Miss Wyoming struggled not to be distracted by the goings-on downstage. She thought of the Tetons, her sisters, and blue lake mist. As Emory Dukes called out the third and second runners-up, she imagined the questions that the judges would ask *her* when they realized their mistake, when they saw to what uses her talent could be put.

Why do you want to be Miss America? *Because I want to help the people of the world; I want to be the special ambassador of love and peace.*

Would you blow the entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro? *I*

would, *I would*. And in her mind she saw rising above the towering Tetons, like movie credits, the words: MISS WYOMING SAVES THE WORLD!

For a moment Corky had the awful feeling that he was no longer standing on solid ground, and he thought, *O God, I must be really lit*. He wanted to chastise himself for getting so drunk, but never before in his entire life had he felt anything so wonderful. His head began to roll out of his control in a crude, uneven circle, and his eyes closed. All he could think of was that maybe he had made a mistake; maybe they really *were* back at the Beach Queen, and he was at long last being saved once and for all from his ordinary life, coached by the one he had coached toward a victory neither of them could have anticipated. From far away, part of a world Corky was fast leaving, Emory Dukes announced the first runner-up.

The audience was whistling and clapping for the New Miss America as Miss Wyoming took another deep breath and drew on Corky with all the energy she had left. An inch off the ground now and rising. Corky forgot himself completely and began to make low, gurgling noises. Several girls in the row in front of them turned around. As his noises grew louder, becoming unearthly in the chaos of his euphoria, more of the girls turned, until in their amazement they unwittingly opened an alley that led all the way downstage to where Miss America was being crowned.

Emory Dukes launched into "There She Goes" as Miss Alaska, flowers in hand, innocent smile flashed to the world, started down the runway. But the television cameras did not follow her. They remained stationary, trained down the alley where they had a head-on view of Miss Wyoming. Dreaming not of USO shows and appearances at 4H clubs but of what a Miss America *should* be, she knelt in service to her country with her eyes raised to Corky, his head and arms flung back in unimaginable delight, having just passed the three-inch mark and still ascending.

UNITED STATES DISTRICT COURT  
DISTRICT OF WYOMING  
Civil No. C79-351

KIMERLI JAYNE PRING,

Plaintiff,

vs.

PENTHOUSE INTERNATIONAL,  
LTD., A New York Corporation, IN-  
LAND EMPIRE PERIODICALS,  
INC., an Oregon Corporation, and  
PHILIP CIOFFARI,

Defendants.

**THIRD AMENDED COMPLAINT**  
**Facts Common To All Causes of Action**

The following facts are common to all causes of action hereinafter plead and the said facts are incorporated by this reference into all subsequent causes of action set forth herein.

1. The Plaintiff is a resident and citizen of Wyoming and as a citizen and has enjoyed all of the privileges of such during all the years past.

2. The Defendant, Penthouse International, Ltd., is a New York corporation with its principal place of business located in the City of New York and State of New York and such Defendant owns and publishes *Penthouse*, a monthly magazine of general circulation in the United States and various other parts of the world, including the State of Wyoming.

3. Inland Empire Periodicals, Inc., is an Oregon corporation qualified to do business in the State of Wyoming and is the local distributor in Wyoming of *Penthouse*.

4. The Defendant, Philip Cioffari (Cioffari) is a resident and citizen of the State of New Jersey.

5. This Court has jurisdiction by reason of the diversity of citizenship of the Plaintiff and Defendants and by reason of the fact that the amount in controversy is a sum in excess of \$10,000.00, exclusive of interest and costs.

6. The acts of the Defendants complained of herein were jointly done and concurrent in nature so as to make all the Defendants joint tortfeasors and individually and jointly liable to the Plaintiff for the damages hereinafter alleged.

7. Without inquiry or notice to the Plaintiff, the Defendant Penthouse International, Ltd., and the Defendant Cioffari developed and created and authored an article concerning the Plaintiff, utilizing her title and likeness without her consent, in the August 1979 issue of *Penthouse*, a copy of said article is attached as Exhibit "A" to Plaintiff's Second Amended Complaint and by this reference made a part hereof. Said article is entitled "Miss Wyoming Saves The World. . . . , But She Blew The Contest With Her Talent."

The article referred to was distributed throughout Wyoming and elsewhere in *Penthouse* magazine by Defendants.

8. In September of 1978, the Plaintiff was chosen Miss Wyoming to represent the State of Wyoming in the Miss America Pageant held in Atlantic City, New Jersey. The Miss America Pageant is an annual event which receives national publicity and television coverage. The purpose of such Miss America Pageant being to choose "Miss America" from the most outstanding representatives of each of the States.

9. Although the actual name of the Plaintiff was not used in the above referred to magazine article, her title and likeness were used so that it is clear, and the public and persons comprising the public would know and reasonably believe that the article was with reference to and described the Plaintiff. In this regard, Plaintiff states as follows:

- (a) Plaintiff was the 1978 Wyoming entry to the Miss America Pageant in Atlantic City, New Jersey, as suggested in the article.
- (b) The Plaintiff is an expert baton twirler who has been awarded many honors for her expertise including the 1978 United States Grand National Women's Sole Championship.
- (c) The Plaintiff had previously attended the University of Wyoming in Laramie, Wyoming, and was the leading baton twirler for the University of Wyoming football team for three years.
- (d) The Plaintiff did in fact wear a blue warm-up suit in her preparation for the Miss America Pageant.
- (e) The Plaintiff also wore a blue chiffon gown in the Miss America Pageant as depicted in the article.
- (f) The Plaintiff has been the only entry in the 1978 Miss America Pageant who did an act with a baton or exhibited baton twirling expertise.
- (g) That the Plaintiff is not a public figure and even if construed to be one the article contains such a fictionalization and misrepresentation of the Miss America Pageant that the article is not newsworthy or of any public interest and no privileges apply.

10. The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest.

11. The aforesaid article was false and the Defendants knew that said article was false, and by the exercise of reasonable care and diligence, the Defendants could have determined the falsity of the article. Instead, the Defendants intentionally, willfully and maliciously published and distributed said article knowing the same to be untruthful, defamatory, libelous and that it would damage the Plaintiff. That the Defendants authored, published and distributed this filth with willful disregard of the rights of the Plaintiff for the purpose of making a profit. That the article was not newsworthy or of public interest; was lurid, indecent; was primarily designed to appeal to prurient interest and was such a fictionalization and misrepresentation of the Miss America Pageant that no immunity under the constitutional guarantees of free speech or free press are applicable to protect the Defendants or permit them to publish this article.

12. The article in question was defamatory upon its face, and libelous per se, but Plaintiff further alleges that said article was, in fact, recklessly published without regard to the existence or nonexistence of the truth, and that all of the Defendants are, therefore, guilty, not only of negligence, but of malice as well.

13. As a result of the libel above referred to, and hereinafter alleged, the Plaintiff has suffered greatly. Her reputation as an honorable, morally straight individual and first class representative of the State of Wyoming in the Miss America Pageant has been destroyed and she has suffered a loss of income in the past of \$10,000.00, and will suffer a loss of income in the future of \$100,000.00. Additionally, the aforesaid libelous matters have and will impair the Plaintiff's business and her business ventures to the loss in the sum of \$500,000.00.

14. As a result of the libel made upon this Plaintiff and the destruction of her good name and reputation thereby, she has been required to endure in the past and will be required to

endure in the future, grave mental, emotional and physical pain and suffering, she has become ill and has suffered a personality change which will be permanent.

Further, the Plaintiff has suffered great embarrassment and humiliation and the Plaintiff will in the future endure constant embarrassment, humiliation, pain and suffering from the loss of her good name and reputation, and as a result of the aforesaid damage, and as a result of the damage caused to Plaintiff's good name and reputation, the Plaintiff has suffered general damages, in addition to the special damages above alleged, in the amount of \$2,000,000.00 for which recovery is also sought herein.

15. That the actions of the Defendants in authoring, publishing and distributing libelous and defamatory material of the nature involved in this matter, are reckless and malicious acts in complete disregard of the rights of Plaintiff and as a result of the reckless, willful, wanton and malicious acts of each of the Defendants, the Plaintiff is entitled to exemplary and punitive damages in the amount of Five Million Dollars (\$5,000,000.00).

## **I**

### **Plaintiff's First Claim Against the Defendants**

For Plaintiff's first claim against the Defendants, jointly and severally, Plaintiff alleges and states as follows:

16. Plaintiff refers to all allegations contained in the paragraphs set forth under the heading, "Facts Common To All Causes of Action", above, and makes said allegations therein contained a part hereof.

17. The picture, the headline and the other paragraphs in the article when given their clear and ordinary meaning, suggest, infer and imply as an illustration of said story, that Plaintiff:



- (1) Did those things as alleged in paragraph 10 hereof.
- (2) That Plaintiff's talent in baton twirling is an analogous talent and runs parallel to a sexually deviant talent as set out in said article which Plaintiff, as Miss Wyoming supposedly possessed and used to commit the acts stated in paragraph 10 hereof.

18. All of the foregoing statements and innuendos arising therefrom are false and defamatory.

19. Penthouse International, Ltd., had no information of the kind published in its abovementioned article which is claimed to be libelous and that instead, the matters therein contained, and each of them, were fully fabricated by Penthouse International, Ltd. and Philip Cioffari, maliciously published by each Defendant without just cause and with willful disregard of the truth, and were published to create a sensational story and in order to further the sales of *Penthouse* magazine.

## II

### Plaintiff's Second Claim Against the Defendants

For Plaintiff's second claim against the Defendants, the Plaintiff alleges and states as follows:

20. Plaintiff refers to all allegations contained in the paragraph set forth under the heading "Facts Common To All Causes of Action" above, and "Plaintiff's First Claim Against The Defendants", and makes said allegations therein contained a part hereof.

21. The above referred to actions of Defendants constituted an unwarranted and unreasonable invasion of Plaintiff's right to privacy as a direct result of which she has been held out to the public in a false light and has been damaged.

22. Plaintiff is a private person, an ordinary, reasonable woman and the several infringements upon her right of privacy, described above, were substantial and were the result of

conduct to which a reasonable and private person would strongly object and of such a nature to be highly offensive and destructive to Plaintiff as they would be to any reasonable person. Defendants invaded the Plaintiff's right of privacy without her permission and with knowledge that their actions would be offensive and destructive to the Plaintiff, a person of ordinary sensibility, and with the knowledge that their publication was not newsworthy or of public interest.

### III

#### **Plaintiff's Third Claim Against The Defendants**

For Plaintiff's third claim against the Defendants, Plaintiff alleges and states as follows:

23. Plaintiff refers to all allegations contained in the paragraphs set forth under the headings "Facts Common To All Causes of Action", and to the allegations contained in "Plaintiff's First Claim Against The Defendants" and "Plaintiff's Second Claim Against The Defendants" and makes said allegations therein contained a part hereof.

24. That the intentional, willful, wanton and malicious acts of the Defendants are of a type which should not be permitted or tolerated when the foreseeable result thereof will be of harm to an innocent victim such as the Plaintiff in this case. Therefore, an example should be made of these Defendants to deter wrongful conduct of this nature in the future and exemplary and punitive damages should be assessed against these Defendants in the amount of Five Million Dollars (\$5,000,000.00).

### IV

#### **Plaintiff's Fourth Claim Against The Defendants Philip Cioffari and Penthouse International, Ltd.**

For Plaintiff's fourth claim against the Defendants Philip Cioffari and Penthouse International, Ltd., the Plaintiff alleges and states as follows:

25. Plaintiff refers to all allegations contained in the paragraphs set forth under the headings "Facts Common To All Causes of Action", and to the allegations contained in "Plaintiff's First Claim Against The Defendants", "Plaintiff's Second Claim Against The Defendants" and "Plaintiff's Third Claim Against The Defendants" and makes said allegations therein contained a part hereof.

26. The placing of the article in the August 1979 issue of Penthouse magazine amounted to a willful, intentional and malicious infliction of mental suffering and severe emotional distress upon the Plaintiff. In particular and without limiting the generality of the foregoing, the references to Plaintiff in the article considered together with the other articles, photographs, cartoons, the title "Miss Wyoming's Unique Talent" being printed on the cover of the magazine, and other writings concerning and expressly describing or depicting various sexually perverted acts, exposing the genitals of the people whose pictures were exhibited as well as depicting explicit homosexual and heterosexual actions and scenes caused such intentional infliction of emotional distress.

27. The mere fact that the article appeared in the August 1979 issue of Penthouse without Plaintiff's consent constituted an intentional infliction of emotional distress upon Plaintiff or in the alternative, such caused an infliction of severe emotional distress upon Plaintiff and was done by these Defendants with reckless disregard for the consequences or the truth.

## V

### **Plaintiff's Fifth Claim Against The Defendants Philip Cioffari and Penthouse International, Ltd.**

For Plaintiff's fifth claim against the Defendants Philip Cioffari and Penthouse International, Ltd., the Plaintiff alleges and states as follows:

28. Plaintiff refers to all allegations contained in the paragraphs set forth under the headings "Facts Common To All Causes of Action", and to the allegations contained in "Plaintiff's First Claim Against The Defendants", "Plaintiff's Second Claim Against The Defendants", "Plaintiff's Third Claim Against The Defendants Philip Cioffari and Penthouse International, Ltd.", "Plaintiff's Fourth Claim Against The Defendants Philip Cioffari and Penthouse International, Ltd." and makes said allegations therein contained a part hereof.

29. The above referred to article and the placement of the article and any and all references to Plaintiff within the August 1979 issue of Penthouse magazine constituted a negligent infliction of emotional distress upon Plaintiff which proximately resulted in damage and injury to Plaintiff as more particularly specified hereinabove.

WHEREFORE, Plaintiff respectfully prays that a judgment be rendered against the Defendants, jointly and severally, for the relief requested herein and for what other relief the Court deems equitable and just.

DATED this \_\_\_\_ day of \_\_\_\_\_, 1980.

KIMBERLI JAYNE PRING  
Plaintiff

By \_\_\_\_\_  
of Spence, Moriarity & Schuster  
Attorneys for Plaintiff  
P.O. Box 554  
Jackson, WY 83001  
(307) 733-7290

**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_, 1980, a true and correct copy of the foregoing Third Amended Complaint was placed in the U.S. Mails, postage prepaid and addressed to all counsel of record as follows:

Carmichael, McNiff & Patton  
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of SPENCE, MORIARITY & SCHUSTER